No. 767

In the Supreme Court of the United States

OCTOBER TERM, 1938

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

NEWPORT NEWS SHIPBUILDING & DRY DOCK COMPANY, A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

INDEX

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The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit entered on February 28, 1939 (I R. 425–426),[1] granting, in part, a petition by the Newport

[1] Pursuant to a stipulation of counsel, the record on the petition in the present case consists of the transcript of record printed by the court below, the appendices to the briefs containing parts of the record relied on by each party and submitted by the respondent and the National Labor Relations Board in the Circuit Court of Appeals, and a typewritten transcript of the entire record lodged with the Clerk. The printed transcript of record in the court below has been designated as Volume I and the appendices of the respondent and the National Labor Relations Board as Volumes II and III, respectively. In the event that the writ is granted, a record will be printed by the Clerk pursuant to stipulation of the parties.

News Shipbuilding & Dry Dock Company, a corporation, to set aside an order of the National Labor Relations Board issued against that company and denying, in part, a request by the National Labor Relations Board for enforcement of said order.

OPINIONS BELOW

The findings of fact, conclusions of law, and order of the National Labor Relations Board (I R. 13–29) are not yet officially reported. The opinion and dissenting opinion in the Circuit Court of Appeals (I R. 413–425) are not yet officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 28, 1939. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) and (f) of the National Labor Relations Act.

QUESTION PRESENTED

Whether, upon findings that respondent has dominated and interfered with the formation and administration of a labor organization of its employees and contributed financial and other support thereto, and is dominating and interfering with the administration of said labor organization, all contrary to Section 8 (2) of the National Labor Relations Act, the National Labor Relations Board,

in addition to ordering respondent to cease and desist from such interference, properly required respondent to withdraw all recognition from said organization as a representative of its employees for purposes of collective bargaining, and completely to disestablish said organization as such representative.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C. Supp. III, Title 29, Sec. 151 *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> (2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *
>
> * * * * *
>
> SEC. 10 (c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the

Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

STATEMENT

Pursuant to a charge (II R. 1) filed with the Board by the Industrial Union of Marine and Shipbuilding Workers of America, a labor organization, the Board, by its regional director for the Fifth Region at Baltimore, Maryland, issued on June 18, 1937, a complaint and notice of hearing which were duly served upon petitioner (II R. 3–7). In addition to jurisdictional allegations, the complaint, so far as now material,[2] alleged that petitioner had dominated, supported, and interfered with the formation and administration of the Employees' Rep-

[2] The complaint also alleged that respondent had discharged seven of its employees in violation of Section 8 (3) of the Act (II R. 4–5). These allegations of the complaint were dismissed by the Trial Examiner with respect to three of the employees (II R. 269), and by the Board with respect to the remainder (I R. 29).

resentative Committee of the Newport News Shipbuilding and Dry Dock Company, a labor organization (sometimes referred to as the Representation of Employees, but hereinafter termed "the Plan"),[3] and that thereby respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (2), and Section 2 (6) and (7), of the Act (II R. 6).

Respondent appeared specially and filed a motion to dismiss the complaint for lack of jurisdiction (II R. 8).[4] It also filed an answer (II R. 9–14) admitting in part the jurisdictional allegations of the complaint, and also admitting that, in cooperation with its employees, "it aided in putting into force and effect at its shipyard a plan of employee representation" (II R. 12), and that "it did lend its moral support and encouragement to the formation and continuation of said plan" (*id.*). It denied, however, that it had engaged in unfair labor practices within the meaning of the Act. Prior to the hearing the Employees' Representative Committee obtained, on motion, leave to intervene in

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[3] The term "revised Plan" will be used to refer to this labor organization as it existed after the amendments in May 1937 (see pp. 10–11, *infra*).

[4] Before filing its motion to dismiss the complaint and its answer respondent sought in the United States District Court to enjoin the agents of the Board from proceeding with the case. The District Court's order dismissing the bill was affirmed by this Court. *Newport News Shipbuilding & Dry Dock Co.* v. *Schauffler*, 303 U. S. 54.

the proceeding, and filed an answer denying the allegations of the complaint (II R. 15–20).

A hearing was held from August 30 to September 8, 1937, before a Trial Examiner designated by the Board (I R. 14). Full opportunity to examine and cross-examine witnesses and to introduce evidence was afforded all the parties. On March 9, 1938, the Trial Examiner filed an intermediate report, finding that petitioner had engaged in and was engaging in unfair labor practices within the meaning of Section 8 (1), (2), and (3)[5] of the Act, and recommending that petitioner cease and desist from such practices and take certain affirmative action to remedy them, including withdrawal of recognition from, and disestablishment of, the Plan as a representative of the employees (II R. 268–270). Exceptions were filed by respondent (II R. 270–274) and by the Committee; and on May 11, 1938, counsel for the respondent, the Committee, and the Union participated in oral argument before the Board, respondent also filing a brief. On August 9, 1938, the Board issued its findings of fact, conclusions of law, and order (I R. 13–29). The facts, as found by the Board, may be summarized as follows:

Nature of respondent's operations.—Respondent, a Virginia corporation, owns and operates at Newport News, Virginia, one of the most important shipyards in the United States (I R. 16, 18).

[5] See footnote 2, p. 4, *supra*.

Respondent there engages in the business of designing, constructing, overhauling, and repairing ships for the United States Navy and for foreign and domestic interests. It also builds water turbines (I R. 16). At the time of the hearing it employed about 5,500 persons (I R. 18).

The enterprise is dependent to a very substantial extent upon interstate commerce for its materials and supplies. Between January 1936 and August 1937 respondent purchased outside the State of Virginia approximately 90 percent of the $13,000,000 worth of materials used in its business. These out-of-state purchases included all of the steel and coal used, more than 82 percent of the lumber, and 87 percent of the remaining materials (I R. 16–17).

Although the greater part of respondent's production consists of ships built for the United States Navy, from June 1934 to the date of the hearing it had under construction three merchant vessels at contract prices aggregating $1,020,000 (I R. 17). A considerable portion of respondent's business also consists of repairing and overhauling vessels of both foreign and domestic registry. Between July 1935 and August 1937 petitioner serviced 322 vessels at a billing price of over $3,000,000 (I R. 17). Included were 43 ships of foreign registry and 279 of American registry, all of the former and a substantial number of the latter being engaged in interstate or foreign commerce (I R. 18).

The unfair labor practices.—The Plan dates from the year 1927, when it was first put into effect by respondent in cooperation with its employees. The purposes of the Plan were stated in its preamble (I R. 19):

> In order to give the employees of the Company a voice in regard to the conditions under which they labor, and to provide an orderly and expeditious procedure for the prevention and adjustment of any future differences, and to anticipate the problem of continuous employment, a method of representation of employees is to be established.

By this original Plan (II R. 247–258) provision was made for the annual election by the employees of 21 white and 7 colored representatives, who were to be paid $100 annually by respondent for serving in that capacity. Supervisory employees were ineligible to vote or serve as representatives. Five committees, each composed of five elected representatives and not more than five representatives selected by the management from among the employees, administered the Plan. The Plan also provided for a Management's Representative, who was "to keep the Management in touch with the representatives, and represent the Management in negotiations with the representatives, their officers and Committees." A provision for arbitration of differences became operative only on the concur-

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[a] The Board's decision erroneously states that there were four committees (I R. 19).

rence of respondent's president. Amendment of the Plan required a vote of either two-thirds of the full membership of the Rules Committee (including representatives selected by the management), or a majority of all the employees' and the management representatives at an annual conference. No provision was made for dues. (I R. 19–20.)

The Plan was revised in 1929, 1931, 1934, 1936, and 1937. The 1931 revision (II R. 239–246), however, was maintained, in substance, until 1937. Under it: (1) one white and one colored employee representative was elected by the employees in each department and division, the management appointing an equal number of management representatives (see II R. 239, 243); (2) the annual remuneration paid elected employees was reduced to $60 (see II R. 240); (3) the five[7] governing joint committees were supplanted by a General Joint Committee, composed of all elected and management representatives (a majority of each class constituting a quorum) and empowered to take final action, subject to the approval of the President of the company, upon all subjects referred to it by any elected or management representatives or by the Management's Representative (see II R. 243–244); (4) an Executive Committee was created composed of five elected employee representatives and five management representatives (see II R. 244); (5) nominations and elections were to be ar-

[7] See footnote 6, p. 8, *supra*.

ranged for by the Management's Representative," "but in so far as possible conducted by the employees themselves" (see II R. 241); (6) the provision for arbitration of grievances upon consent of respondent's president was eliminated in favor of a provision that if the Executive Committee failed to settle the matter "the President of the Company shall be notified" (see II R. 245–246); (7) the old amendment procedure was eliminated and amendments could be made by a two-thirds vote of the entire General Joint Committee, "when approved by the President of the Company" (see II R. 246).

The Board's finding was that from the Plan's inception until its revision in 1937 respondent dominated, assisted, and interfered with the formation and administration of the Plan (I R. 20).

The 1937 revision occurred in May, shortly after this Court had sustained the constitutionality of the Act, but 22 months after the effective date of the Act. It originated in the General Joint Committee, one-half of the members of which were management representatives, and was referred for suggestions to the similarly constituted Executive Committee and to the elected representatives separately. The personnel manager and the general manager of respondent each took an active part in the revision of the Plan (I R. 21). On May

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* The Board's decision erroneously states that the nominations and elections were arranged by the management representatives (see I R. 20).

20, 1937, after the Management's Representative announced that the revision was acceptable to respondent, the revised Plan was adopted by the General Joint Committee (I R. 20–21).

The Board's finding was that since the procedure followed was that of amendment of the existing plan—a procedure which required respondent's consent—the revision could not possibly be considered the independent action of the employees or of their elected representatives (I R. 21). The Board also found that the provisions of the revised Plan made it still the creature of respondent. The revised Plan (II R. 198–209) eliminated the compensation paid to elected representatives (see II R. 202), and substituted for the General Joint Committee and the Executive Committee a single Employees' Representative Committee, composed of representatives elected by the employees (see II R. 206). The revised Plan, however, provided that the action of that Committee "shall be final, and become effective upon agreement by the Company" (see II R. 207), and that any article of the Plan may be amended by two-thirds of the entire membership of the Committee "unless disapproved by the Company within 15 days after their passage" (see II R. 209). The procedure for settling grievances concludes with presentation of the grievance to the respondent's personnel manager or general manager (see II R. 208–209). As thus revised, the Plan has been in operation at respondent's shipyard since June 30, 1937. It was

printed in booklet form at respondent's expense, and distributed by respondent's supervisors. Copies of the minutes of each meeting held by the Committee are duplicated at respondent's expense and on respondent's stationery, and distributed through respondent's mailing service, one copy being regularly sent to respondent's personnel manager (I R. 22–23).

The Board found that respondent had dominated and interfered with the formation and administration of the Plan, and had contributed support to it (I R. 23). The Board also found that respondent had power under the revised Plan to stifle independent action of the Committee, and that the Committee is incapable of serving respondent's employees as their genuine representative for the purposes of collective bargaining (I R. 23).

Upon these findings the Board concluded that respondent had engaged and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1) and (2), and Section 2 (6) and (7) of the Act. It thereupon ordered respondent (I R. 28–29) to cease and desist from such unfair labor practices, to withdraw all recognition from the Plan as a representative of its employees, completely to disestablish the Plan as such representative, and to post appropriate notices. The Board dismissed its complaint with respect to violations of Section 8 (3) of the Act (see footnote 2, p. 4, *supra*).

On August 18, 1938, respondent, pursuant to Section 10 (f) of the Act, filed with the Circuit Court of Appeals for the Fourth Circuit its petition to review the foregoing order (I R. 1–11). On August 29, 1938, the Board filed an answer and request for enforcement of its order (III R. 1–7). On February 28, 1939, the court directed the enforcement of the order with the elimination therefrom of paragraph 2 (a), requiring withdrawal of recognition from and disestablishment of the Plan as a representative of the employees. Judge Parker dissented from that part of the decision directing the elimination of said paragraph 2 (a). The full court held that the Board had jurisdiction over respondent (R. 415), and also agreed with the Board's conclusion that respondent had dominated and interfered with and contributed support to the Plan in violation of Section 8 (2) of the Act, and ordered enforcement of the cease and desist provisions of the order directed to those violations (R. 421). With respect to paragraph 2 (a), however, the majority, relying on various assertions and evidence as to which no findings had been made by the Board, concluded that "When all of the circumstances of the case are considered * * * the inference that the [Plan] * * * is still the creature of the company * * * cannot in our opinion be reasonably drawn" (R. 420). Judge Parker was of opinion that the court improperly considered facts not found by the Board; that the majority, in eliminating para-

graph 2 (a), had improperly substituted its discretion for that of the Board, which had been properly exercised; and that the order should be given full enforcement (R. 422–425).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that there was "no reasonable ground" upon which the Board's order requiring respondent to withdraw recognition from and disestablish the Plan as a representative of its employees could be sustained.

2. In refusing to enforce and in setting aside paragraph 2 (a) of the Board's order.

ARGUMENT

I

THE DECISION BELOW IS IN PROBABLE CONFLICT WITH DECISIONS OF THIS COURT

The court below upheld the conclusion of the Board that respondent had been guilty of violations of Section 8 (1) and (2) of the Act in dominating, interfering with, and contributing support to the Plan, and directed enforcement of those portions of the Board's order requiring cessation of such practices. The majority refused, however, to enforce paragraph 2 (a) of the order, which, as affirmative relief found by the Board to be necessary to effectuate the policies of the Act, requires respondent to withdraw all recognition from and completely to disestablish the Plan as a representative of its employees for the purposes of collective bar-

gaining.* That conclusion we believe to be in conflict with decisions of this Court in which, on facts similar to those here presented, the Court has denied the power of the Circuit Courts of Appeals to substitute their discretion for that of the Board, and has directed the enforcement of similar disestablishment orders. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 268; *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272; *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, No. 436, decided February 27, 1939.

The findings of the Board, which have been summarized in the Statement, *supra*, show that the Plan was put into effect in 1927 by respondent in cooperation with its employees. As originally constituted it was entirely the creature of respondent. Respondent paid representatives elected to represent the employees for their services in that capacity (I R. 19). Respondent had an equal voice with these "employee representatives" on all governing committees (I R. 19). And respondent could effectively prevent any amendment of the Plan (*id.*).

* Paragraph 2 (a), although affirmative in form, is negative in effect. It simply directs non-recognition. The term "disestablish" is used in its dictionary sense—"to deprive of fixed or established state or character; specifically, to withdraw state patronage, support, or exclusive recognition from; as to disestablish a church." *New Standard Dictionary of the English Language* (Funk & Wagnalls, 1935).

In the other ways summarized in the Statement, *supra*, respondent lent its prestige and support to the Plan with the design, and inevitable effect, that the Plan became established and entrenched as the sole representative of the employees in respondent's yard.

As the Board found (I R. 21), the Plan never has lost its original character as an employer dominated labor organization. A revision in 1931 reduced the pay of employee representatives from $100 to $60 (I R. 20), and changed the governing committees from five to two (*id.*), but left respondent with an equal voice with the employee representatives on each committee (*id.*). Respondent was given a double check on amendments: by its equal representation on the General Joint Committee it could easily prevent the required two-thirds vote of the entire membership of that Committee, and, if that were insufficient, respondent's president could simply withhold his approval (*id.*).

In May 1937, after the Plan had been in existence for ten years, respondent purported to bring it into harmony with the requirements of the Act. When the attempt was finally made, both the revision procedure utilized and the results obtained showed how little the Plan can be said to be the free choice of respondent's employees. The procedure was one of amendment of the Plan, which insured respondent's complete control over all changes (I R. 21). Indeed, respondent went even further;

both its general manager and its personnel manager actively participated in drafting the amendments finally submitted and adopted (*id.*). Moreover, although the revised Plan eliminated the provisions for remuneration to employee representatives, and eliminated the representation of the respondent on the governing committee (*id.*), an effective check on committee activity was retained through the provision that action by the governing committee should become effective only "upon agreement by the Company" (*id.*), and by the provision that amendments could be had only if company disapproval was not expressed within fifteen days (*id.*). The miscellaneous means by which respondent has impressed upon the employees a realization that the employer's power, prestige, and favor are liberally exercised on behalf of the Plan, such as respondent's printing of the minutes on its own stationery, have remained the same since the Plan's establishment.

On these findings, the conclusion of the majority of the court below that there is "no reasonable ground" of support for the finding of the Board that the Plan could not serve as a genuine bargaining representative is squarely opposed to the decision in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261. In that case officers of the employer had been active in promoting and in preparing the details of the labor organization; adjustment of grievances was under the complete control of the company; amendments

were controlled by a requirement of a two-thirds vote in a body in which employer and employee representatives were equal in number. The Court concluded (p. 271):

> In view of all the circumstances the Board could have thought that continued recognition of the Association would serve as a means of thwarting the policy of collective bargaining by enabling the employer to induce adherence of employees to the Association in the mistaken belief that it was truly representative and afforded an agency for collective bargaining, and thus to prevent self-organization. The inferences to be drawn were for the Board and not the courts. * * * There was ample basis for its conclusion that withdrawal of recognition of the Association by respondents, accompanied by suitable publicity, was an appropriate way to give effect to the policy of the Act.

The decision below also conflicts even more markedly with *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272. There a similar disestablishment order was upheld as a proper exercise of the discretion committed to the Board, notwithstanding that disestablishment had been ordered solely upon the ground that a record of past domination and interference by the employer indicated that a mere order to cease and desist "would not set free the employee's impulse to seek the organization which would effectively represent him" (303 U. S. at p. 275.) Here, in addition, the Board found a structural incapacity which made disestablishment more clearly impera-

tive. The decision below also conflicts with *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, No. 436, decided February 27, 1939, in which disestablishment was ordered solely upon findings of what this Court termed the "promotion efforts" of the employer. See also *Consolidated Edison Co.* v. *National Labor Relations Board*, Nos. 19, 25, decided December 5, 1938.[10]

We submit that it is impossible to reconcile the decision of the majority in the court below with these decisions. On the other hand, the dissenting opinion reveals a realistic appreciation of labor relations and of the purposes of the present Act which is in complete harmony with these decisions of this Court. Judge Parker stated (R. 423):

> In the light of this history of the plan, the Board, I think, was thoroughly justified in concluding that the 1937 change in the plan would not remove the dominating influence

[10] See also *National Labor Relations Board* v. *J. Freezer & Son, Inc.*, 95 F. (2d) 840 (C. C. A. 4th); *National Labor Relations Board* v. *Wallace Manufacturing Co.*, 95 F. (2d) 818 (C. C. A. 4th); *National Labor Relations Board* v. *Eagle Manufacturing Co.*, 99 F. (2d) 930 (C. C. A. 4th); *Virginia Ferry Co.* v. *National Labor Relations Board*, decided January 9, 1939 (C. C. A. 4th); *National Labor Relations Board* v. *The Falk Corp.*, decided March 7, 1939 (C. C. A. 7th); *National Labor Relations Board* v. *Carlisle Lumber Co.*, 94 F. (2d) 138 (C. C. A. 9th), certiorari denied, 304 U. S. 575, 99 F. (2d) 993, certiorari denied, No. 504, March 6, 1939; *National Labor Relations Board* v. *Oregon Worsted Co.*, 96 F. (2d) 193 (C. C. A. 9th); *National Labor Relations Board* v. *American Potash & Chemical Corp.*, 98 F. (2d) 488 (C. C. A. 9th), certiorari denied, No. 594, February 27, 1939.

> of the company obtained through the preceding ten-year period. The committee was an established institution functioning in accordance with techniques developed through years of company domination. It was probably too much to hope that by a mere change in the plan it would change its character, rid itself of company influence, and become a free bargaining agency such as the act contemplates. Whether it could do so or not was a matter for the Board to determine in the discharge of its administrative function; and the Board may well have concluded that only by disestablishing the committee as a bargaining agency and starting anew could free and untrammeled action on the part of the employees be secured.

At most, the majority opinion pays only formal heed to the principles established by this Court. Actually, it rejects a conclusion of the Board, which finds substantial support in the evidence, that withdrawal of recognition from the Plan and its disestablishment as a collective-bargaining agency were necessary to effectuate the policies of the Act. The result is that the court has substituted its discretion for that of the Board in a case where the Board's discretion was properly exercised.

In addition, the majority opinion relies upon certain assertions and upon certain evidence, as to which no findings were made by the Board, to distinguish the present case from those heretofore decided by this Court. Apart from the obvious answer that the court was not warranted in making

findings of fact not made by the Board (*General Utilities and Operating Co.* v. *Helvering*, 296 U. S. 200, 206; *Helvering* v. *Rankin*, 295 U. S. 123, 131), the court's reliance upon those facts indicates a misconception of the principles stated by this Court. Those facts did not warrant the court in holding that the Board's findings do not find reasonable support in the evidence or that its discretion was improperly exercised.

For example, under the decisions of this Court it is completely irrelevant that, pursuant to a suggestion of the court during the argument below, the revised Plan may have been further revised after the argument [11] to eliminate those provisions giving respondent a veto power over any final action of the Employees Committee and over any amendment to the Plan itself. The propriety of the order does not depend simply upon whether the formal provisions of the Plan were such that it could function as a genuine representative; this would only be relevant assuming a freedom of choice in the employees, which they have never had in respondent's plant. *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272; *Consolidated Edison Co.* v. *National*

[11] The court seems also to have departed from the rule, stated by this Court in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, in enforcing an order similar to that here in question (p. 271):

"But an order of the character made by the Board, lawful when made, does not become moot because it is obeyed or because changing circumstances indicate that the need for it may be less than when made."

Labor Relations Board, Nos. 19, 25, decided December 5, 1938; *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, No. 436, decided February 27, 1939. It is simply contrary to reason to urge that a labor organization, the formation and administration of which have been interfered with and dominated by an employer for over ten years, can suddenly become a free and independent agent by a mere change in form, even if the acts of interference and domination have ceased. Without doubt respondent, by lending to the Plan its support and prestige, not only at the outset but throughout its existence, has guided, influenced, and formed the Plan into an instrument of its own policy. Without doubt respondent, by recognizing the Plan, has been a powerful, if not irresistible, factor in securing adherents to it. *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548. Without doubt, the attitude of the employees toward it as respondent's instrument has been definitely shaped. Enforcement of only the cease and desist provisions of the order allows respondent to reap the benefit of its unquestioned violation of Section 8 (2) of the Act in the past—that is, exclusive representation of its employees by a labor organization responsive to its wishes. Irrespective of the Plan's formal characteristics at the present time, it is necessarily true that only by withdrawal of the recognition which has been accorded to the Plan can there be even a partial restoration of the freedom of choice in selection of a bargain-

ing representative which would have obtained had the statute not been violated.

The same departure from the principles established by this Court is revealed in the emphasis placed by the majority opinion below upon other evidence not deemed significant by the Board under the decisions of this Court and therefore not included in its findings—the continued participation in the elections held under the Plan of a large majority of the employees, and the alleged desire of the employees to continue the Plan, as evidenced by a referendum. Even if taken at face value, giving weight to this evidence assumes a freedom of choice which does not exist—it does not indicate what the choice of the employees would be apart from the ten-year history of domination, interference, and support which has established the Plan in its present commanding position. What that choice would have been can never be certain, but only by a withdrawal of recognition from the Plan can conditions be restored as nearly as possible to what they would have been had respondent not been guilty of long-continued violations of the Act. Only in this manner can circumstances permitting a free choice be established.

Finally, the decisions of this Court make it clear that no reliance can be placed upon the continued peaceful relations between respondent and its employees referred to in the majority opinion. Absence of industrial strife produced by successful employer control of employees' self-organization is

not the peace which Congress intended to achiev by this Act. The Act, and the decisions of thi Court under it, make it clear beyond question tha a forced truce resulting from unfair labor practice is not, and cannot be, regarded as a satisfactor substitute for the stable peace which results fron the adjustment of differences by negotiation be tween an employer and the freely designated rep resentatives of his employees. Reliance by th court upon the absence of industrial strife betwee respondent and its employees flies in the face of th Congressional findings and challenges the very basis of the Act.

We submit, therefore, that the decision of th court below conflicts, in several important respects with the applicable decisions of this Court.

II

THE COURT BELOW HAS ERRONEOUSLY DECIDED A QUESTION OF GREAT IMPORTANCE IN THE FUTURE ADMINISTRATION OF THE ACT

The decision below, unless reviewed by this Court may lead to serious confusion in the proper ad ministration of the Act. Other Circuit Courts o Appeals may be inclined to follow the decision be low, not only in relying upon assertions not in the record as to changes made subsequent to the orde of the Board (see pp. 20–21, *supra*), but also in re lying upon facts which are irrelevant to the prope determination of questions similar to that here pre sented (see pp. 21–24, *supra*). There are a large number of cases in which similar orders of dis

establishment have been issued by the Board, some of which may go to the courts, including the court below, and there are other cases awaiting decision before both the Board and the courts. Obviously, orders for affirmative relief of this character are of the utmost importance in preventing the continued recognition of employer-inspired labor organizations which can serve only to thwart the genuine collective bargaining contemplated by the Act. Such orders are essential to free employees from the effects of long-continued unfair labor practices, and to permit the free choice guaranteed by Section 7. The appropriate remedying of violations of Section 8 (2) is essential to the maintenance of the Act's basic principles. Faced with the decision below, the Board cannot proceed intelligently and consistently in the disposition of these cases.

CONCLUSION

The decision below is in conflict with applicable decisions of this Court. It is of importance in the future administration of the Act that it be reviewed. Wherefore, we respectfully submit that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fourth Circuit should be granted.

ROBERT H. JACKSON,
Solicitor General.

CHARLES FAHY,
General Counsel,
National Labor Relations Board.

MARCH 1939.

U. S. GOVERNMENT PRINTING OFFICE 1939